

ORIGINAL

IN THE SUPREME COURT OF OHIO
2009

STATE OF OHIO,

Case No. 2008-1693

Plaintiff-Appellee,

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

-vs-

MICHAEL ARNOLD,

Court of Appeals
Case No. 07AP-789

Defendant-Appellant.

MERIT BRIEF OF PLAINTIFF-APPELLEE

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555

and

KIMBERLY BOND 0076203
(Counsel of Record)
Assistant Prosecuting Attorney
kmbond@franklincountyohio.gov

COUNSEL FOR PLAINTIFF-APPELLEE

YEURA R. VENTERS 0014879
Franklin County Public Defender
373 South High Street-12th Fl.
Columbus, Ohio 43215
614/462-3960

and

DAVID L. STRAIT 0024103
(Counsel of Record)
Assistant Public Defender

**COUNSEL FOR DEFENDANT-
APPELLANT**

FILED
MAY 19 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	2
ARGUMENT.....	5
RESPONSE TO PROPOSITION OF LAW.....	5
In order to qualify as a “police interrogation,” which triggers the “primary-purpose” test set forth in <i>Siler</i> , there must be direct and overt police involvement in the interview. In the absence of such direct and overt police involvement, the “reasonable expectations of the declarant” test set forth in <i>Stahl</i> applies. [<i>State v. Stahl</i> , 111 Ohio St.3d 186, 2006- Ohio-5482, and <i>State v. Siler</i> , 116 Ohio St.3d 39, 2007-Ohio-5637, applied].....	5
I. Testimonial Hearsay.....	5
II. Police Interrogations and the Primary-Purpose Test.....	7
III. Ohio Jurisprudence: applying the primary-purpose test to law enforcement interrogations.....	9
IV. Ohio Appellate Courts: medical interviews do not elicit testimony.....	13
V. Analysis.....	16
A. Participation on a multidisciplinary team does not imbue a medical professional with a law enforcement purpose.....	16
B. Direct and overt police involvement is required to establish a law enforcement purpose.....	19
C. Absent overt and direct police involvement in the interview, the “objective-witness” test determines whether the declarant’s statements are testimonial.....	22
VI. Harmless error.....	26
CONCLUSION.....	27
CERTIFICATE OF SERVICE.....	28
APPENDIX.....	29

TABLE OF AUTHORITIES

Cases

<i>Bourjaily v. United States</i> (1987), 483 U.S. 171	24
<i>California v. Cage</i> (2007), 40 Cal. 4th 965, 988, 155 P.3d 205.....	19, 23
<i>Colorado v. Vigil</i> (2006), 127 P.3d 916	18, 19, 20, 23
<i>Crawford v. Washington</i> (2004), 541 U.S. 36.....	5, 7, 8, 23
<i>Davis v. Washington</i> (2006), 547 U.S. 813	6, 7, 9, 23
<i>Hammon v. Indiana</i> (2006), 547 U.S. 813	8
<i>Hernandez v. Florida</i> (2007), 946 So.2d 1270.....	18
<i>Illinois v. Stechly</i> (2007), 225 Ill.2d 246, 870 N.E.2d 333	23
<i>In the matter of S.P.</i> (2008), 218 Ore. App. 131, 178 P.3d 318	20
<i>Iowa v. Bentley</i> (2007), 739 N.W.2d 296.....	20
<i>Kansas v. Henderson</i> (2007), 284 Kan. 267, 160 P.3d 766	20
<i>Maryland v. Snowden</i> (2005), 385 Md. 64, 867 A.2d 314.....	19, 20
<i>Miller Chevrolet v. Willoughby Hills</i> (1974), 38 Ohio St.2d 298	28
<i>Minnesota v. Krasky</i> (2007), 736 N.W.2d 636.....	18, 19, 23
<i>Missouri v. Justus</i> (2006), 205 S.W.3d 872	20
<i>Montana v. Spencer</i> (2007), 339 Mont. 227, 231, 169 P.3d 384	19
<i>North Dakota v. Blue</i> (N.D. 2006), 717 N.W.2d 558.....	18
<i>Ohio v. Roberts</i> (1980), 448 U.S. 56	6
<i>Oregon v. Mack</i> (2004), 337 Ore. 586, 101 P.3d 349	19
<i>Seely v. Arkansas</i> (2008), 373 Ark. 141	19, 23
<i>State v. 1981 Dodge Ram Van</i> (1988), 36 Ohio St.3d 168.....	28
<i>State v. Arnold</i> , 10th Dist. No. 07AP-789, 2008-Ohio-3471	2

<i>State v. Ball</i> , 10th Dist. No. 07AP-818, 2008-Ohio-2648.....	14, 15
<i>State v. Brown</i> , 11th Dist. No. 2007-P-0014, 2008-Ohio-832	13, 15
<i>State v. D.H.</i> , 10th Dist. No. 07AP-73, 2007-Ohio-5970.....	14, 15
<i>State v. Dever</i> (1992), 64 Ohio St.3d 401	25
<i>State v. Edinger</i> , 10th Dist. No. 05AP-31, 2006-Ohio-1527.....	14
<i>State v. Gilfillan</i> , 10th Dist. No. 08AP-317, 2009-Ohio-1104	13, 14, 15
<i>State v. Goza</i> , 8th Dist. No. 89031, 2007-Ohio-6837	13, 15
<i>State v. Hunneman</i> , 12th Dist. No. CA2006-01-006, 2006-Ohio-7023	13
<i>State v. Kidder</i> (1987), 32 Ohio St. 3d 279	26
<i>State v. Lortz</i> , 9th Dist. No. 23762, 2008-Ohio-3108	13, 15
<i>State v. M.B.</i> , 10th Dist. No. 08AP-169, 2009-Ohio-752.....	13, 14
<i>State v. Muttart</i> , 116 Ohio St.3d 5, 2007-Ohio-5267	1, 10, 11, 12, 13
<i>State v. Siler</i> , 116 Ohio St.3d 39, 2007-Ohio-5637.....	9, 12, 19
<i>State v. Stahl</i> , 111 Ohio St.3d 186, 2006-Ohio-5482.....	10, 11, 13, 22
<i>State v. Swanigan</i> , 5th Dist. No. 08A19, 2009-Ohio-978	13, 16
<i>T.P. v. Alabama</i> (2004), 911 So.2d 1117	19
<i>United States v. Hendricks</i> (C.A. 3, 2005), 395 F.3d 173.....	24
<i>United States v. Saget</i> (C.A. 2, 2004), 377 F.3d 223	24
<i>Washington v. Garnica</i> (June 30, 2008), Court of Appeals, Division One, No. 59365-0-118	
<i>Whorton v. Bockting</i> (2007), 549 U.S. 406	7

Statutes

R.C. 2151.01(A).....17
R.C. 2151.421(A).....17
R.C. 2151.421(F).....17
R.C. 2151.426.....17
R.C. 2151.428.....17

Rules

Evid.R. 803(4).....11, 25

Regulations

O.A.C. 5101:2-33-26(A).....17

INTRODUCTION

Statements made in medical interviews are presumptively nontestimonial. Children do not respond to questions at a medical facility with the expectation that their statements will be used in a criminal prosecution. A child's statement in such an interview cannot be considered testimonial absent a showing that overt and direct police participation in the interview changed the purpose of the interview.

This case involves a medical interview of a four-year-old at Nationwide Children's Advocacy Center (CAC). The only purpose for the interview was to gather a medical history from the child so that the medical professionals could conduct an appropriate medical examination and order the appropriate treatment for the child. Passive police observation of the interview did not influence or alter the purpose of the medical interview. When the circumstances and the declarant's expectations show that the statements were made for medical diagnosis and treatment, the statements are nontestimonial because "they are not even remotely related to the evils which the Confrontation Clause was designed to avoid." *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267, ¶ 63.

STATEMENT OF THE CASE

On December 15, 2005, defendant was indicted on two counts of rape, both first-degree felonies. (Trial Ct. Rec. 1) Count One charged vaginal intercourse, and Count Two charged cunnilingus. (Id.) The victim of these offenses was defendant's four-year-old daughter, hereafter referred to as "M.A." (Id.)

At trial, following the testimony of paramedic Charles Fritz and the victim's mother Wendy Otto, the court conducted a hearing outside the presence of the jury to

determine whether the M.A.'s statements to Kerri Marshall, a forensic interviewer employed by the CAC, were made for medical purposes. (Vol. II, 112-122, 140) The assistant prosecutor questioned Marshall about her role at the CAC and the procedures used during the M.A.'s interview. (Id. at 123-126, 128-130) The court and the parties watched the DVD outside the presence of the jury. (Id. at 131) Defense counsel did not ask Marshall any questions. The court, discussing competency as well as confrontation issues, noted that the child's statements were made for purposes of medical diagnosis and treatment under Evid.R. 803(4) and, therefore, determined that the statements were nontestimonial. (Id. at 137-138)

The jury returned verdicts finding defendant guilty as charged in Count One and not guilty as to Count Two. (Trial Ct. Rec. 261-262) Defendant's conviction was affirmed. *State v. Arnold*, 10th Dist. No. 07AP-789, 2008-Ohio-3471.

STATEMENT OF THE FACTS

In the late evening hours of December 7, 2005, Otto discovered that defendant had sexually abused their four-year-old daughter. (Vol. I, 76) Otto, who had been awakened by thumping noises, discovered that the door to the bedroom she shared with defendant was locked. (Id.) Otto demanded that the door be unlocked. (Id.) After defendant unlocked and opened the door, Otto saw that defendant's boxers were not on all the way and that half his buttocks was exposed. (Id. at 76-77) Otto also saw her daughter, M.A., in the bed "stiff as a board" with the comforter balled up on her mid-section. (Id. at 78) M.A.'s underwear was bunched around her ankles. (Id. at 78-79)

Defendant stated that he was not “doing anything,” and he directed M.A. to say the same thing. (Id. at 79) When Otto called 911, defendant left the premises in Otto’s car. (Id. at 81-82)

Fritz, a firefighter/paramedic with the Columbus Fire Department, responded to the scene at 11:12 p.m. (Id. at 49, 53-54) Fritz observed that the child was very anxious and withdrawn. (Id. at 51) Without objection, Fritz testified that when he attempted to discover what was wrong with M.A., the child indicated that she had been touched in her private area. (Id. at 53)

The paramedics transported the child, and her mother, to Nationwide Children’s Hospital. (Id.) It was after midnight when Otto and M.A. arrived at the hospital, where medical personnel collected samples for a rape kit. (Id. at 85-86, 88) While at the hospital, Otto was advised to take M.A. to the CAC the next day. (Id. at 86)

At approximately 9 a.m., Otto took M.A. to the CAC. (Id. at 86) Otto and M.A. were informed that the doctors would be conducting a physical examination to ensure that M.A. was alright. (Id. at 87) Prior to the examination, Marshall interviewed the child. (Vol. II, 123, 141) Otto was not allowed to sit with M.A. during the child’s interview. (Vol. I, 86) Marshall testified that the CAC was a part of Nationwide Children’s Hospital and detailed her training. (Vol. II, 141-145; 147-149) Marshall explained that the purpose of her interview with the child was to collect information for the medical diagnosis and treatment of the child. (Id. at 149) Marshall explained that, during the interview, M.A. advised her of genital-to-genital contact. (Id. at 154) M.A. said that she and her father (defendant) were “playing pee-pees.” (Id. at 173) M.A. described the conduct, stating that defendant put his “pee-pee” in her “pee-pee.” (Id. at 154) M.A. also stated that defendant

touched her “pee-pee” with his hand and his mouth. (Id.) The DVD of the interview (State’s Exhibit G) was played and admitted. (Id. at 157, 261)

Gail Horner, a nurse practitioner at the CAC, examined M.A. (Id. at 238) Based upon her experience and training, Horner was found to be an expert in the sexual-assault field. (Id. at 227-230) Horner testified the interview guides her examination. (Id. at 233) When, as in this case, there has been a report of genital contact, it may be necessary to test for sexually transmitted diseases or to determine if there has been injury to the genital area. (Id. at 234-235) In the genital examination of M.A., Horner found two abrasions to M.A.’s hymen. (Id. at 239; State’s Exhibit B) The abrasions were red but not bleeding. (Id.) Horner testified that these abrasions were caused by acute trauma to the hymen and that these abrasions were the result of a penetration injury. (Id. at 239, 248, 256) M.A. did not testify.

Evidence was collected from the scene, including blood-stained toilet paper that found next to the bed. (Id. at 202) DNA testing showed that the blood on the toilet paper was from M.A. (Id. at 214) Testing conducted on other items was inconclusive or excluded defendant. (Id. at 213-215)

Defendant sought to establish that a straddling injury could mimic sexual-abuse trauma. (Vol. III, 283-284) However, defense witness, Dr. Christine Baker, testified that a straddle injury would not cause injury to the hymen. (Id. at 285-286)

ARGUMENT

RESPONSE TO PROPOSITION OF LAW

In order to qualify as a “police interrogation,” which triggers the “primary-purpose” test set forth in *Siler*, there must be direct and overt police involvement in the interview. In the absence of such direct and overt police involvement, the “reasonable expectations of the declarant” test set forth in *Stahl* applies. [*State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, and *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, applied]

The State’s proposition of law is consistent with this Court’s decisions and adheres to the intent of Sixth Amendment. Medical interviews at the CAC are not conducted for prosecutorial purposes but, rather, have an independent, medical purpose. There was no direct and overt police participation in the interview, and mere observation of the interview did not change the purpose of the interview. A declarant’s objective expectations in such an interview are to receive needed medical evaluation and, if necessary, treatment.

When the purpose of a declarant’s medical interview is challenged, the threshold inquiry is whether law enforcement was directly and overtly involved in that interview. Only when there is a showing that law enforcement was overtly and directly involved with the child’s interview can there be a finding that the interview was conducted for law enforcement purposes. When the presence of law enforcement is not overt and when law enforcement officials do not direct or participate in the interview, the testimonial inquiry hinges on the expectations of the declarant.

I. Testimonial Hearsay

In *Crawford v. Washington* (2004), 541 U.S. 36, the United States Supreme Court overruled the reliability analysis governing the admission of hearsay set forth in *Ohio v.*

Roberts (1980), 448 U.S. 56. A judicial determination of the reliability of hearsay, according to the Court, was inconsistent with the framers' intent and led to inconsistent results. *Crawford*, 541 U.S. at 63-64. After conducting an exhaustive examination of English common-law and pre-constitutional Colonial law, the Court found that the Confrontation Clause was concerned only with "testimonial" hearsay. *Id.* at 51.

Without adopting a definition of "testimonial," the Court focused on identifying the circumstances that would generate testimonial hearsay. *Id.* at 51-52. Noting that testimonial statements were "solemn declarations or affirmations made for the purpose of establishing or proving some fact," the Court's discussion repeatedly returned to elements of formality attendant to the production of testimonial statements. *Id.* at 51, quoting 2 N. Webster, *An American Dictionary of the English Language* (1828). Examples noted by the Court of the circumstances that would give rise to testimonial statements included ex parte court proceedings, preliminary hearings, grand jury proceedings, sworn affidavits or depositions, and police interrogations. *Id.* at 52, n. 3. The Court has since clarified that testimonial statements mark out not merely the "core" of the Confrontation Clause, but its perimeter. *Davis v. Washington* (2006), 547 U.S. 813, 824.

In contrast, nontestimonial hearsay does not trigger a Confrontation Clause analysis. The Court explained that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law, as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." *Crawford*, 541 U.S. at 68. The Court stated that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject

to the Confrontation Clause.” *Davis*, 547 U.S. at 821. The Confrontation Clause poses no bar at all to the admission of nontestimonial hearsay. *Whorton v. Bockting* (2007), 549 U.S. 406, 420.

II. Police Interrogations and the Primary-Purpose Test

Although statements made during formal custodial police interrogations are presumptively testimonial, the *Davis* Court found that not all police interrogations elicit testimonial hearsay. 547 U.S. at 826. Instead, the Court looked to the circumstances in which the statements were developed and the declarant’s objective expectations to determine whether the statements were testimonial or nontestimonial. *Id.* at 826-828. In *Davis*, the Court held that statements are testimonial when the circumstances establish that, viewed objectively, the primary purpose of a police interrogation is to prove past events potentially relevant to later criminal proceedings and no on-going emergency exists. *Id.* at 822.

As the Court’s discussion shows, the circumstances surrounding the interrogation - including the reason for the interrogation, the formality of the interview, and the declarant’s expectations during the interrogation - determine the primary purpose of a police interrogation. *Id.* at 826-828. These factors were apparent in *Crawford*, where there was a visible police presence and a high level of formality attendant to the custodial interrogation. *Crawford*, 541 U.S. at 65-66. The statements at issue were made by the defendant’s wife, who was also a suspect in the stabbing and was in custody at the time of the interview and had been advised of her *Miranda* rights. *Id.* at 53, 64; see *Davis*, 547 U.S. at 822. The officers used investigatory techniques in questioning the declarant, telling her that her release was dependent on the progress of the investigation. *Crawford*, 541

U.S. at 65. The Court noted that statements made during such a custodial interrogation qualified under “any conceivable definition” of interrogation, *id.* at 53, n. 4, and “fall squarely within [the] class of testimonial hearsay” because those interrogations were “directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.” *Davis*, 547 U.S. at 826.

Overt police presence and use of police investigatory procedures was also apparent in *Hammon v. Indiana* (2006), 547 U.S. 813, 832, the companion case to *Davis*. In *Hammon*, uniformed officers responded to reports of a domestic altercation. *Id.* at 830. The disturbance had ended by the time police arrived. Upon arriving at the scene, the officers separated the suspected victim and the suspected offender and began their investigation to determine whether a crime had taken place. *Id.* at 819. After taking the victim’s statement and documenting the scene, the officer had the victim sign an affidavit in which she asserted that the defendant assaulted her. *Id.* at 820. The officer testified that he obtained the victim’s affidavit “[t]o establish events that have occurred previously.” *Id.* at 832. The *Hammon* Court determined that victim’s statements were testimonial because “they were not much different from the statements we found testimonial in *Crawford*. *Id.* at 829.

The Court considered the declarant’s expectations in their analysis. In both *Crawford* and *Hammon*, the declarants knew the purpose of the interrogation. The *Crawford* Court found that the declarant’s statements were testimonial because they were “*knowingly* given in response to structured police questioning.” *Crawford*, 541 U.S. at 53 n. 4 (emphasis added). Similarly, in *Hammon*, the declarant knew she was speaking with police officers who were investigating a reported domestic disturbance. The statements

made by these declarants were knowingly made to police officers during a police investigation.

Davis presented the Court with different circumstances and expectations. Unlike *Crawford* and *Hammon*, there was no custodial interrogation or formality surrounding the police questioning of the declarant. Rather, the statements were elicited by a 911 operator. The 911 operator, considered for purposes of that case to be an agent of the police, asked numerous questions to ascertain whether an emergency existed, to determine the nature of the emergency, and to ensure police safety in responding to the scene. *Davis*, 547 U.S. at 823. The operator was not gathering information for future prosecution but, rather, had an independent purpose - which was “to resolve the present emergency.” *Id.* at 827.

Like *Crawford* and *Hammon*, the *Davis* Court also examined the declarant’s expectations in its discussion of whether the statements made to a police agent were testimonial. The Court noted that the victim’s objective purpose in making the statements was to seek assistance against a threat. *Id.* Emphasizing the nontestimonial nature of these statements, the Court stated that “no witness goes into court to proclaim an emergency and seek help.” *Id.* at 827-828.

III. Ohio Jurisprudence: applying the primary-purpose test to law enforcement interrogations.

This Court has applied the primary-purpose test when, like the facts in *Crawford*, *Davis* and *Hammon*, it was readily apparent that the declarant was questioned directly by a law enforcement officer or police agent. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637. In contrast, when it was apparent that the declarant was speaking with someone other than a law enforcement agent, this Court applied an objective-declarant standard to

determine whether the declarant expected the statements to be used in a future prosecution. Id. at ¶ 42; *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, ¶ 36; *Muttart*, at ¶¶ 49, 61.

Stahl and *Muttart* are instructive here because the declarant was interviewed by someone other than a police officer and the interview was for the purpose of receiving medical treatment. In *Stahl*, this Court addressed whether an adult victim's statements to a nurse, in the presence of a police officer, were testimonial. *Stahl*, at ¶ 10. This Court rejected the defendant's broad propositions of law that sought to classify *all* statements to forensic medical examiners as "inherently testimonial in nature" based on the center's mission statement, receipt of governmental funding, and the standard procedures such as obtaining medical release authorization from the victim. Id. at ¶¶ 39-41. Examining the declarant's expectations, this Court found that the victim's statements were nontestimonial. Id. at ¶ 40.

Stahl involved statements made by a rape victim the day after she was raped. The victim reported the incident to the police, and she was transported by a police officer to the DOVE center, a facility specializing in treatment of sexual assault victims. Id. at ¶ 2. As is typical at any medical facility, the nurse took a detailed medical history which included a description of the incident which led the victim to seek medical treatment. Id. at ¶ 7. A police officer sat with the victim during the nurse's interview but did not participate in that interview. Id. The victim signed a release form allowing the medical facility to provide the samples collected from the examination to the police. Id. at ¶ 3.

The defendant argued that the interview was the functional equivalent of a police interrogation and, therefore, the victim's statements should be considered testimonial. In his argument, Stahl relied heavily on the presence of a police officer during the interview

and the center's mission statement. Id. at ¶ 40. Neither the presence of the officer nor the center's mission statement changed the medical facility into a branch of law enforcement. And, this Court noted that the center's "mission" was not the sole reason for the center's existence; rather, "this function is at best secondary to the DOVE unit's primary motivation, the care of its patients." Id. at ¶ 39. More importantly, as this Court found, "[n]othing in the record establishes that a reasonable person in [the victim's] position would believe that the DOVE unit serves primarily a prosecutorial function or that the DOVE unit even has a mission statement." Id. at ¶ 40.

Similarly, the implementation of standard procedures applicable at most medical facilities did not make the center a branch of law enforcement. The nurse's duty to her patient required her to obtain a medical history and a detailed account of what led the victim to seek medical attention, and the nurse was required to conduct a physical examination including the collection of biological samples for analysis, and obtain a consent or release form from the patient to share the patient's medical information. Id. at ¶¶ 41, 43. As this Court noted, these procedures are followed at any medical facility or emergency room. Id.

In *Muttart*, the purpose of a child-victim's statements to a social worker and counselors was challenged. Discussing admissibility under Evid.R. 803(4), this Court emphasized that the "salient inquiry here [was] whether the child's statements were made for purposes of diagnosis and treatment rather than for some other purpose." *Muttart*, at ¶ 47. To ascertain the actual purpose of the statements, this Court set forth a non-exhaustive list of considerations, including an assessment of the declarant's age and mental state, that

would be indicators of the purpose of the interview. *Id.* at ¶ 49. Those factors established the child's statements were made for purposes of obtaining medical treatment. *Id.* at ¶ 56.

Like *Stahl*, the *Muttart* Court found that there was no police involvement during the interviews. The *Muttart* Court stated the child's statements were not made "in the context of in-court testimony or its equivalent. There was no suggestion that they were elicited as part of the police investigation . . . or that they were a pretext of façade for state action." *Id.* at ¶¶ 61-62. The subsequent use of the statements was not determinative in the testimonial inquiry. *Id.* Accordingly, this Court found that "[s]tatements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under *Crawford*, because they are not even remotely related to the evils which the Confrontation Clause was designed to avoid." *Id.* at ¶ 63.

Unlike *Stahl* and *Muttart*, *Siler* addressed whether a child's statements to a police officer at a crime scene were testimonial. In *Siler*, a three-year-old child was home at the time his father killed his mother. *Siler*, at ¶ 7. Several police officers responded to the scene, where the child was interviewed by a detective. *Id.* at ¶ 8. The detective testified to the statements made by the child that implicated defendant as the perpetrator. *Id.* at ¶ 9. In his trial testimony, the detective acknowledged that his interview served an investigatory purpose. *Id.* at ¶ 44.

Given the direct and overt involvement of the police in the child's interview when there was no on-going emergency, and given the stated law enforcement purpose of the interview, this Court applied the primary-purpose test to determine whether the child's statements were testimonial. *Id.* at ¶ 30. The child's expectations under the facts in this case were not determinative of whether the statements were testimonial in nature. *Id.* at ¶

41. This Court noted that its test as applied to police questioning had no impact on cases where the declarant is questioned by someone other than the police. *Id.* at ¶ 42. Thus, under *Stahl* and *Muttart*, the expectations of the declarant are relevant to determine whether the declarant was producing testimonial statements when it is clear that the declarant is not speaking to a law enforcement officer or agent. *Stahl*, at ¶ 36; *Muttart*, at ¶ 61.

IV. Ohio Appellate Courts: medical interviews do not elicit testimony

Several Ohio appellate courts have rejected defendant's contention that CAC interviews are for law enforcement rather than medical purposes. In determining whether a child's statements at such a facility are testimonial, Ohio courts incorporate the analysis set forth in *Stahl* and *Muttart* by examining the identity of the interviewer, the circumstances surrounding the child's interview and the declarant's expectations. *State v. Swanigan*, 5th Dist. No. 08A19, 2009-Ohio-978; *State v. Goza*, 8th Dist. No. 89031, 2007-Ohio-6837; *State v. Lortz*, 9th Dist. No. 23762, 2008-Ohio-3108; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104; *State v. Brown*, 11th Dist. No. 2007-P-0014, 2008-Ohio-832; *State v. Hunneman*, 12th Dist. No. CA2006-01-006, 2006-Ohio-7023. Under this analysis, these courts properly conclude that a child's statements are nontestimonial when the interviewer is an employee of the medical facility and the totality of the circumstances surrounding the interview, including the child's expectations, show that the interview was for purposes of medical diagnosis and treatment.

The Tenth District Court of Appeals has reviewed and repeatedly rejected the allegation that a child's interview at the CAC is the functional equivalent of a police interview. *Gilfillan*, at ¶ 82; *State v. M.B.*, 10th Dist. No. 08AP-169, 2009-Ohio-752; *State*

v. *Ball*, 10th Dist. No. 07AP-818, 2008-Ohio-2648, ¶ 16; *State v. D.H.*, 10th Dist. No. 07AP-73, 2007-Ohio-5970, ¶ 53; *State v. Edinger*, 10th Dist. No. 05AP-31, 2006-Ohio-1527. The Tenth District has recognized that the individual at the CAC who questions the child-patient is an employee of a hospital, rather than a law enforcement investigator. *Ball*, at ¶ 16; *D.H.*, at ¶ 52; *Edinger*, at ¶ 78. The court has also found that CAC social workers are not employed for the purpose of investigating criminal acts of child abuse. *Ball*, at ¶ 16; *Gilfillan*, at ¶ 82. Instead, the interview is conducted in a medical setting for a medical purpose prior to a physical examination. *Gilfillan*, at ¶ 84. The social worker's job is to gather information from the child for the medical staff. *Ball*, at ¶ 16; *D.H.*, at ¶ 39. In addition, the records prepared in the context of the interview are completed in the normal course of evaluating a patient. *Edinger*, at ¶ 78.

R.C. 2151.425 to 2151.428, which allow for the creation of multidisciplinary teams at CAC facilities, do not vest medical personnel with a law enforcement purpose. Regarding the procedures employed by the CAC, the Tenth District has found that the "police and prosecution representation at the Advocacy Center does not make the center's employees the agents of the police when providing services to sex abuse victims." *Gilfillan*, at ¶ 82; *M.B.*, at ¶ 2, n. 3. In addition, the social worker does not work with the police during the interview, and the social worker does not act at the direction of the police. *Edinger*, at ¶ 82. Law enforcement personnel do not control the interview and the police are not overtly present. *D.H.*, at ¶ 52, citing *Edinger*, at ¶ 82.

The medical purpose of a CAC interview has also been recognized by the Eleventh District Court of Appeals. *State v. Brown*, 11th Dist. No. 2007-P-0014, 2008-Ohio-832. In *Brown*, a detective was informed of alleged abuse and interviewed the child's parents. The

detective then made an appointment for the child at the CAC, affiliated with Robinson Memorial Hospital. *Id.* at ¶ 76. When a nurse interviewed the child to obtain a medical history, a detective watched via closed circuit television from a different location. *Id.* at ¶ 122. Under these circumstances, the court rejected the defendant's Sixth Amendment challenge, finding that the child's statements had been made for the purposes of medical diagnosis and treatment and, therefore, were "not even remotely related to the evils which the Confrontation Clause was designed to avoid." *Id.* at ¶ 132, quoting *Muttart*, at ¶ 63.

Because there is no overt and direct law enforcement participation with the medical interview, appellate courts apply *Stahl's* "objective-witness" test, examining the declarant's expectations to determine whether the statements are testimonial in nature. *Gilfillan*, at ¶ 84 (child made statements with knowledge of the medical setting for furtherance of medical and diagnosis and treatment were nontestimonial); *D.H.*, at 53; *Brown*, at ¶ 122. "Although other people, including a detective from the Franklin County Sheriff's Office, watched the interview, there is nothing in the record that would demonstrate that [the child] was aware these persons were watching the interview." *Ball*, at ¶ 16.

In a case with similar reasoning, the Eighth District has found that a child's statements to a social worker with the County Children and Family Services Sex Abuse Intake Department were not testimonial. *State v. Goza*, 8th Dist. No. 89031, 2007-Ohio-6837. Although the child had been seen by a nurse, the social worker's duty and purpose during the interview was to determine whether the child needed medical or psychological treatment. *Id.* at ¶ 38; *Lortz*, at ¶ 23. As such, the statements did not offend the Confrontation Clause. *Goza*, at ¶ 39.

For similar reasons, a child's statements to a forensic sexual assault nurse examiner have also been considered nontestimonial. *Swanigan*, at ¶ 68. The court applied *Stahl's* "objective-witness" test and factors in *Muttart* to determine purpose of the interview. *Id.* at ¶¶ 15, 19. The circumstances surrounding the interview and the child's expectations during the interview supported the conclusion that the statements were not testimonial but, rather, had been made for the purposes of medical diagnosis and treatment. *Id.* at ¶ 68.

V. Analysis

Defendant's proposition of law seeks to establish a law enforcement purpose to the medical interviews conducted at the CAC. Defendant asks this Court to conclude that this and similar facilities have a law enforcement, rather than medical, purpose and therefore are intended to elicit testimonial statements. Adoption of defendant's proposition would be a significant departure from precedent set forth by the United States Supreme Court and this Court's prior rulings.

A. Participation on a multidisciplinary team does not imbue a medical professional with a law enforcement purpose.

Defendant's attempt to establish a law enforcement purpose in the CAC interview is unpersuasive. The existence of multidisciplinary teams does not transform a medical interview into a law enforcement operation. Medical personnel participating on such teams have their own independent duties and do not become law enforcement officers simply because they provide information to other team members. Instead, and as most jurisdictions conclude, finding a law enforcement purpose in an interview requires showing overt police presence and direct police involvement in that interview.

Nevertheless, defendant cites portions of R.C. Chapter 2151 to support his proposition that the existence of multidisciplinary teams at the CAC transforms what

would otherwise be considered a medical interview into the functional equivalent of a law enforcement interrogation. Defendant errs in his analysis. The purpose R.C. Chapter 2151 is “to provide for the care, protection, and mental and physical development of children . . . in a family environment.” R.C. 2151.01(A). Creation of these teams merely facilitates communication between team members. Even if such teams did not exist, the sharing of information would be required because medical professionals are mandated reporters. R.C. 2151.421(A). Indeed, Marshall noted that even before the creation of the CAC and the multidisciplinary teams, she was required to forward her report and the report from the medical examination to law enforcement and other agencies. (Vol. II, 147) Marshal and Horner testified that they have a duty to report the information they gather accurately. (Id. at 150, 236)

The existence of multidisciplinary teams at the center does not advance a law enforcement purpose because the members of these teams have different duties aimed at achieving different purposes. Indeed, the purpose of the memorandum of understanding (MOU) between participating members is to document the “respective duties and requirements of all involved.” O.A.C. 5101:2-33-26(A). The MOU for the CAC at Children’s Hospital is not part of the record.

None of the provisions in R.C. 2151.426 to 2151.428 deputizes medical professionals or vests medical professionals with law enforcement responsibilities. R.C. 2151.421(F)(1) specifies that it is the public children services agency that, with law enforcement, must investigate allegations of abuse, and they must conduct such an investigation within twenty-four hours of being notified of suspected abuse.

The existence of a multidisciplinary “team” at a medical facility does not change the purpose of the medical interview. *Colorado v. Vigil* (2006), 127 P.3d 916, 923-294, cert. denied, 549 U.S. 842; see also, *Minnesota v. Krasky* (2007), 736 N.W.2d 636; *Washington v. Garnica* (June 30, 2008), Court of Appeals, Division One, No. 59365-0-I (unreported)(finding that medical personnel’s training and experience with police and prosecutors did not determine the purpose of the interview). Rather, statutes allowing for the creation of such teams merely facilitate the exchange of information as team members pursue their *respective* duties. These statutes do not “deputize” medical personnel or otherwise allow them to investigate crimes. *Vigil*, 127 P.3d 923; *Krasky*, 736 N.W.2d at 642-643 (compliance with statutory scheme focused on protection of children’s health and welfare, does not render the child’s statements testimonial.) And, conversely, law enforcement members are not imbued with authority to perform medical functions. Furthermore, these statutes were created to standardize a child’s medical care in an attempt to ensure that all patients receive appropriate medical attention. Such measures in no way impose a law enforcement obligation on medical professionals.

Cases cited by defendant wrongly imputed a law enforcement purpose to a medical interview. *Hernandez v. Florida* (2007), 946 So.2d 1270; *North Dakota v. Blue* (N.D. 2006), 717 N.W.2d 558. What these courts failed to recognize is that, given the mandatory reporting requirements, the medical professionals were required to pass the information to the police – regardless of whether a multidisciplinary team existed to facilitate the transfer of that information.

Just as the existence of multidisciplinary teams does not change the purpose of a medical interview, mandatory-reporting statutes do not change a medical interview into a

law enforcement interrogation. *Seely v. Arkansas* (2008), 373 Ark. 141, 154, cert. denied, ___ U.S. ___, 129 S.Ct. 218. Reporting statutes require medical professionals as well as several other specified professionals to report suspected cases of abuse. The Supreme Court of Arkansas agreed that such statutes do not reflect a legislative directive “intended to deputize this litany of professional and individuals into law enforcement.” *Id.*, quoting *Montana v. Spencer* (2007), 339 Mont. 227, 231, 169 P.3d 384. The California Supreme Court also found that a doctor’s duty to report suspected abuse did not change the nature or purpose of a medical interview. *California v. Cage* (2007), 40 Cal. 4th 965, 988, 155 P.3d 205, cert. denied, ___ U.S. ___, 128 S.Ct. 612. The Court explained that the reporting statute does not oblige a doctor to investigate crimes and does not make medical professionals investigative agents of law enforcement. *Id.*

B. Direct and overt police involvement is required to establish a law enforcement purpose.

A declarant’s statements may be deemed testimonial when the record establishes direct and overt law enforcement participation in the interview when no on-going emergency exists. *Siler*, at ¶ 46; *Vigil*, 127 P.3d at 923; *Krasky*, 736 N.W.3d at 641; *Maryland v. Snowden* (2005), 385 Md. 64, 867 A.2d 314; *Oregon v. Mack* (2004), 337 Ore. 586, 101 P.3d 349; *T.P. v. Alabama* (2004), 911 So.2d 1117. To establish that a medical interview is really a façade for a law enforcement interrogation, a defendant must show a “direct and controlling police presence” during the interview. *Vigil*, 127 P.3d at 923. Without more, police observation of a child’s medical interview cannot change the nature of the medical interview.

Some courts have found that a direct and overt law enforcement participation at a CAC or similar facility can establish a law enforcement purpose to a child’s interview. *In*

the matter of S.P. (2008), 218 Ore. App. 131, 178 P.3d 318; *Missouri v. Justus* (2006), 205 S.W.3d 872. In Oregon, pervasive law enforcement involvement at the CAC was demonstrated by the housing of the grand jury at the center's facilities for purposes of indicting criminal offenses and by the director's description of his duty to "coordinate interview participation among law enforcement, child protection services and prosecutors." *In the matter of S.P.*, 178 P.3d at 327.

Similarly, some courts find direct and overt law enforcement involvement when it is apparent that there was a joint investigation between law enforcement and a children services agency. *Snowden*, 867 A.2d at 326-327; *Iowa v. Bentley* (2007), 739 N.W.2d 296 (interview by police officer and human services investigator during joint investigation elicited testimonial statements); *Kansas v. Henderson* (2007), 284 Kan. 267, 160 P.3d 766 (same); *T.P.*, 911 So.2d at 1121. For example, the *Snowden* Court found that the law enforcement purpose permeated the interview because: (1) the interviews were conducted by a social worker, who was a child abuse investigator; (2) the social worker interviewed the child-declarants at the direct request of the police as part of a formal investigation; (3) the police presence during the interview was overt; and (4) the declarant's knew the interview was for the law enforcement purposes. *Snowden*, 867 A.2d at 326-327. As these cases show, direct and overt police involvement in the interview can establish a law enforcement purpose to a declarant's interview.

The decisions of such cases are inapposite here, because defendant has not shown direct and overt police involvement with the interview in this case. Indeed, the record refutes such a conclusion. Marshall did not interview M.A. at the request of law enforcement. Rather, M.A.'s mother brought the child to the facility to ensure that her

daughter received appropriate medical care and attention. Marshall was not acting as a proxy for a law enforcement officer, and Marshall was not a criminal investigator. The only purpose for the interview was to gather a complete medical history for the child's medical evaluation. Police observation of the interview did not change Marshall's focus.

The trial testimony of Marshall and Horner confirmed that the CAC serves to meet the *medical* needs of children who may have been abused. Law enforcement participation on the multidisciplinary team had no impact on the purpose of the interview. There was no overt police presence at the CAC during the interview. Law enforcement did not participate in the interview, and they did not suggest questions to be used during the interview.

Marshall and Horner confirmed the medical purpose of the interview. Marshall, an employee of the CAC, testified that the purpose of her interview with M.A. was to obtain a medical history for the physician or nurse practitioner. Collecting a medical history is a standard procedure employed at every medical facility because the treating physician must understand the patient's medical past as well as the patient's current medical situation. The fact that a medical history is collected in a center created to provide medical services to abused children does not create a law enforcement purpose in a medical interview. See, *Stahl*, at ¶ 40.

Medical providers rely on a patient's history to diagnosis their patient, to determine what tests should be conducted, and to determine what, if any, follow-up care or treatment is needed. The record in this case exemplifies this practice. According to nurse practitioner Horner, the history obtained by the forensic interviewer is important for her to make an accurate diagnosis and to determine the appropriate treatment for a specific case.

Horner testified that the information obtained during the interview “guides” the physical examination. Horner explained that when a child indicates that a penis touched her vagina, as in this case, then she knows that she must examine the child’s vaginal region for trauma and may need to order tests for sexually transmitted diseases. The child was in fact tested for sexually transmitted diseases, specifically HIV and Hepatitis B, with the recommendation that screenings be repeated in six months. (State’s Exhibit B)

Horner’s medical examination revealed two abrasions to the child’s hymen. The abrasions were red but not bleeding. Horner testified that the abrasions were a sign of acute trauma, and Horner determined, based on her medical expertise, that the trauma had occurred within 24-48 hours. Both Horner and Dr. Baker testified that only a penetrating-type injury could cause the abrasions to the hymen. So-called “straddling” injuries affect other areas of the body.

C. Absent overt and direct police involvement in the interview, the “objective-witness” test determines whether the declarant’s statements are testimonial.

In *Stahl*, this Court examined the declarant’s expectations to determine whether the declarant’s statements were testimonial because there was no direct and overt police participation in the interview. *Stahl*, at ¶ 36. Other courts have also adopted this analysis and concluded that, in the absence of overt and direct law enforcement participation in the declarant’s interview, an “objective-witness” test governs the testimonial inquiry. *Seely*, 373 Ark. at 152; *Cage*, 40 Cal.4th at 984 (examining the declarant’s expectations to determine if the statement was “given and taken primarily for the purpose ascribed to testimony.”); *Vigil*, 127 P.3d at 925; *Illinois v. Stechly* (2007), 225 Ill.2d 246, 870 N.E.2d 333, 289. In *Seely*, the Arkansas Supreme Court has concluded that “[w]here a statement

is made to a non-official, it is presumptively nontestimonial, but can be shown to be testimonial if the primary purpose of the statement is to create evidence for use in court.” *Seely*, 373 Ark. at 152. The *Seely* Court included the child declarant’s expectations in its assessment of the purpose of the child’s statement to a CAC social worker, finding it relevant to the testimonial inquiry that there was no indication that the child was aware the statements could be used in a criminal proceeding. *Id.* at 155.

The Minnesota Supreme Court applied a testimonial inquiry that examined the declarant’s expectations as well as the questioner’s intent. *Krasky*, 736 N.W.2d at 641. The *Krasky* Court identified eight factors to guide the testimonial analysis. *Id.*, (citation references omitted.) The declarant’s purpose and the declarant’s emotional state were both considered relevant to determining whether the statements were testimonial. *Id.* at 641-642.

Stahl’s objective-witness test adheres to the founding principles of the Sixth Amendment. “[T]he common nucleus shared by the Supreme Court’s three formulations of testimonial evidence, *Crawford*, 541 U.S. at 52, centers upon the declarant’s expectations.” *Vigil*, 127 P.3d at 925. The declarants’ expectations in *Crawford* and *Hammon* emphasized the testimonial nature of their statements because they knew they were speaking directly with police officers in the context of criminal investigations. *Crawford*, 541 U.S. at 53; *Davis*, 547 U.S. at 830. In contrast, the victim’s expectations in *Davis* showed that she was seeking assistance in an on-going emergency. *Davis*, 547 U.S. at 828.

Crawford’s approval of *Bourjaily v. United States* (1987), 483 U.S. 171, provides further support for the conclusion that the testimonial inquiry focuses on the reasonable expectations of the declarant at the time the statement is made – and not on the

expectations of the person who hears the statement or of some abstract “witness” engaging in an after-the-fact assessment of all the circumstances. *Crawford*, 541 U.S. at 58. In *Bourjaily*, a co-defendant’s unwitting statements to an FBI informant, which were recorded without the declarant’s knowledge, were admitted into evidence. *Bourjaily*, 483 U.S. at 181-84. Although *Bourjaily* applied the now-abrogated *Roberts* “reliability” test, the *Crawford* Court cited *Bourjaily* as an example of a case in which nontestimonial statements were correctly admitted against the defendant despite the lack of a prior opportunity for cross-examination.

Notably, federal courts have found that statements to a confidential informant are not testimonial since the declarant had no reason to expect his statements were going to be used at a future court proceeding. See, e.g., *United States v. Hendricks* (C.A. 3, 2005), 395 F.3d 173, 183, n. 9 (holding that unwitting statements made to confidential informant were not testimonial because the declarants “did not realize that their statements were going to be used prosecutorially”); *United States v. Saget* (C.A. 2, 2004), 377 F.3d 223, 229-230 (holding that “a declarant’s statements to confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*.”).

Under *Stahl*’s objective-witness test, the statements made by M.A. during the CAC interview are not testimonial. Otto, acting in the best interest of her child, sought medical treatment and evaluation for M.A. at the CAC. Contrary to defendant’s suggestion, there is no indication in the record that the police advised her to take the child to the CAC. Otto testified that while in the emergency room after the incident, she was advised to take M.A. to the CAC – it may well be that hospital personnel made that recommendation.

At the CAC, Otto and M.A. were informed that, after the child's interview, M.A. would have a physical to make sure her body was alright. The record shows that child was uncomfortable discussing the abuse. The child had been traumatized by the abuse and the subsequent dramatic upheaval in her family, and her statements show her concern with the fact that her parents had been fighting and that her father was in jail. This upheaval in her family hampered her ability to discuss what had happened. Indeed, M.A. may have felt responsible for these events because the change in the family dynamics coincided with Otto's discovery of the abuse.

Like the declarant in *Stahl*, M.A. did not intend for her statements to be used at trial. Indeed, it is debatable whether a four-year-old child would understand the legal ramifications of what happened to her. The child was not acting like a witness. She was simply a patient at the CAC responding to questions that would allow the medical providers to address her medical needs. M.A.'s statements identifying her father as the individual who touched her privates and her description of the touching were relevant and necessary for the medical examination as well as for treatment. *State v. Dever* (1992), 64 Ohio St.3d 401, 414 (recognizing that the identity of the perpetrator is relevant to medical diagnosis and treatment, and holding that when such statements are made for purpose of diagnosis and treatment, they are admissible under Evid.R. 803(4)). M.A.'s disclosure of abuse to her medical provider was not testimonial because those statements were "not even remotely related to the evils which the Confrontation Clause was designed to avoid." *Muttart*, at ¶ 63.

VI. Harmless error

Should this Court find a law enforcement purpose to the medical interview, the admission of M.A.'s statements was harmless beyond a reasonable doubt. Error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of the defendant's guilt. *State v. Kidder* (1987), 32 Ohio St. 3d 279, 284.

Even without M.A.'s statements, overwhelming evidence supports defendant's conviction. The evidence before and after the rape conclusively prove that defendant raped the four-year-old child. Otto woke up to thumping noises late at night and, when she investigated the sound, she discovered that defendant had locked the bedroom door. Defendant and M.A. were in the bedroom. Otto testified that, when she entered the room, she noticed that defendant's boxer shorts were only partially on – as Otto explained, half of defendant's buttocks were exposed. Otto also described her daughter's appearance, stating that M.A. was "stiff as a board." A blanket had been bunched over the child's middle section, and the child's underwear was bunched around her ankles. Blood-stained toilet paper was by the bed. Defendant fled the scene when emergency personnel were called. The child told emergency responders that her privates had been touched.

Had the child's statements been excluded at trial, the State could have amended the indictment to allege other forms of vaginal penetration because the medical evidence conclusively established that penetration occurred. Again, Horner testified that she observed two abrasions on the hymen. These abrasions were red but not bleeding by the time Horner examined the child. The jury could have properly concluded that the child's injury had been bleeding because toilet paper stained with the child's blood was found by

the bed. Additionally, Horner testified that the injury was recent, occurring within 24 to 48 hours before the examination.

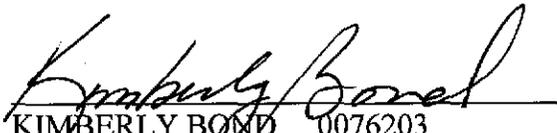
This was no "straddling" injury. Both Horner and defendant's medical expert Dr. Baker testified that only penetration of the child's vagina results in injury to the hymen. On this record, the child's statements were merely cumulative and any error in the admission of the child's statements was harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Franklin County Court of Appeals should be affirmed.¹

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney



KIMBERLY BOND 0076203
Assistant Prosecuting Attorney
373 South High Street-13th Fl.
Columbus, Ohio 43215
614/462-3555
kmbond@franklincountyohio.gov

Counsel for Plaintiff-Appellee

¹ If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *Miller Chevrolet v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301 & n. 3; *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170.

CERTIFICATE OF SERVICE

This is to certify that on May 19, 2009, a copy of the foregoing was hand-delivered to David Strait, 373 South High Street-12th Fl., Columbus, Ohio 43215, Counsel for Defendant-Appellant; and that a copy of the foregoing was mailed, via regular U.S. Mail, to the following persons:

Kelly K. Curtis
Assistant State Public Defender
Office of the Ohio Public Defender
250 East Broad Street, 14th Floor
Columbus, Ohio 43215

Ian N. Friedman and Eric C. Nemecek
Ian N. Friedman & Associates
1304 W. Sixth Street
Cleveland, Ohio 44113


KIMBERLY BOND 0076203
Assistant Prosecuting Attorney

APPENDIX

R.C. 2151.01..... A-1
R.C. 2151.421..... A-2

STATUTORY PROVISIONS

2151.01 Liberal interpretation and construction.

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

Effective Date: 01-01-2002

2151.421 Reporting child abuse or neglect.

(A)(1)(a) No person described in division (A)(1)(b) of this section who is acting in an official or professional capacity and knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child shall fail to immediately report that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Division (A)(1)(a) of this section applies to any person who is an attorney; physician, including a hospital intern or resident; dentist; podiatrist; practitioner of a limited branch of medicine as specified in section 4731.15 of the Revised Code; registered nurse; licensed practical nurse; visiting nurse; other health care professional; licensed psychologist; licensed school psychologist; independent marriage and family therapist or marriage and family therapist; speech pathologist or audiologist; coroner; administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; person engaged in social work or the practice of professional counseling; agent of a county humane society; person, other than a cleric, rendering spiritual treatment through prayer in accordance with the tenets of a well-recognized religion; employee of a county department of job and family services who is a professional and who works with children and families; superintendent, board member, or employee of a county board of mental retardation; investigative agent contracted with by a county board of mental retardation; employee of the department of mental retardation and developmental disabilities; employee of a facility or home that provides respite care in accordance with section 5123.171 of the Revised Code; employee of a home health agency; employee of an entity that provides homemaker services; a person performing the duties of an assessor pursuant to Chapter 3107. or 5103. of the Revised Code; or third party employed by a public children services agency to assist in providing child or family related services.

(2) Except as provided in division (A)(3) of this section, an attorney or a physician is not required to make a report pursuant to division (A)(1) of this section concerning any communication the attorney or physician receives from a client or patient in an attorney-client or physician-patient relationship, if, in accordance with division (A) or (B) of section 2317.02 of the Revised Code, the attorney or physician could not testify with respect to that communication in a civil or criminal proceeding.

(3) The client or patient in an attorney-client or physician-patient relationship described in division (A)(2) of this section is deemed to have waived any testimonial privilege under division (A) or (B) of section 2317.02 of the Revised Code with respect to any communication the attorney or physician receives from the client or patient in that attorney-client or physician-patient relationship, and the attorney or physician shall make a report pursuant to division (A)(1) of this section with respect to that communication, if all of the following apply:

(a) The client or patient, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(b) The attorney or physician knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar position to suspect, as a result of the communication or any observations made during that communication, that the client or patient has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the client or patient.

(c) The abuse or neglect does not arise out of the client's or patient's attempt to have an abortion without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(4)(a) No cleric and no person, other than a volunteer, designated by any church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith who is acting in an official or professional capacity, who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired child under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child, and who knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, that another cleric or another person, other than a volunteer, designated by a church, religious society, or faith acting as a leader, official, or delegate on behalf of the church, religious society, or faith caused, or poses the threat of causing, the wound, injury, disability, or condition that reasonably indicates abuse or neglect shall fail to immediately report that knowledge or reasonable cause to believe to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, the person making the report shall make it to the public children services agency or a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. In the circumstances described in section 5120.173 of the Revised Code, the person making the report shall make it to the entity specified in that section.

(b) Except as provided in division (A)(4)(c) of this section, a cleric is not required to make a report pursuant to division (A)(4)(a) of this section concerning any

communication the cleric receives from a penitent in a cleric-penitent relationship, if, in accordance with division (C) of section 2317.02 of the Revised Code, the cleric could not testify with respect to that communication in a civil or criminal proceeding.

(c) The penitent in a cleric-penitent relationship described in division (A)(4)(b) of this section is deemed to have waived any testimonial privilege under division (C) of section 2317.02 of the Revised Code with respect to any communication the cleric receives from the penitent in that cleric-penitent relationship, and the cleric shall make a report pursuant to division (A)(4)(a) of this section with respect to that communication, if all of the following apply:

(i) The penitent, at the time of the communication, is either a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age.

(ii) The cleric knows, or has reasonable cause to believe based on facts that would cause a reasonable person in a similar position to believe, as a result of the communication or any observations made during that communication, the penitent has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the penitent.

(iii) The abuse or neglect does not arise out of the penitent's attempt to have an abortion performed upon a child under eighteen years of age or upon a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age without the notification of her parents, guardian, or custodian in accordance with section 2151.85 of the Revised Code.

(d) Divisions (A)(4)(a) and (c) of this section do not apply in a cleric-penitent relationship when the disclosure of any communication the cleric receives from the penitent is in violation of the sacred trust.

(e) As used in divisions (A)(1) and (4) of this section, "cleric" and "sacred trust" have the same meanings as in section 2317.02 of the Revised Code.

(B) Anyone who knows, or has reasonable cause to suspect based on facts that would cause a reasonable person in similar circumstances to suspect, that a child under eighteen years of age or a mentally retarded, developmentally disabled, or physically impaired person under twenty-one years of age has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or other condition of a nature that reasonably indicates abuse or neglect of the child may report or cause reports to be made of that knowledge or reasonable cause to suspect to the entity or persons specified in this division. Except as provided in section 5120.173 of the Revised Code, a person making a report or causing a report to be made under this division shall make it or cause it to be made to the public children services agency or to a municipal or county peace officer. In the circumstances described in section 5120.173 of the Revised Code, a person making a

report or causing a report to be made under this division shall make it or cause it to be made to the entity specified in that section.

(C) Any report made pursuant to division (A) or (B) of this section shall be made forthwith either by telephone or in person and shall be followed by a written report, if requested by the receiving agency or officer. The written report shall contain:

- (1) The names and addresses of the child and the child's parents or the person or persons having custody of the child, if known;
- (2) The child's age and the nature and extent of the child's injuries, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist, including any evidence of previous injuries, abuse, or neglect;
- (3) Any other information that might be helpful in establishing the cause of the injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to have occurred or of the threat of injury, abuse, or neglect that is known or reasonably suspected or believed, as applicable, to exist.

Any person, who is required by division (A) of this section to report child abuse or child neglect that is known or reasonably suspected or believed to have occurred, may take or cause to be taken color photographs of areas of trauma visible on a child and, if medically indicated, cause to be performed radiological examinations of the child.

(D) As used in this division, "children's advocacy center" and "sexual abuse of a child" have the same meanings as in section 2151.425 of the Revised Code.

(1) When a municipal or county peace officer receives a report concerning the possible abuse or neglect of a child or the possible threat of abuse or neglect of a child, upon receipt of the report, the municipal or county peace officer who receives the report shall refer the report to the appropriate public children services agency.

(2) When a public children services agency receives a report pursuant to this division or division (A) or (B) of this section, upon receipt of the report, the public children services agency shall do both of the following:

(a) Comply with section 2151.422 of the Revised Code;

(b) If the county served by the agency is also served by a children's advocacy center and the report alleges sexual abuse of a child or another type of abuse of a child that is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, comply regarding the report with the protocol and procedures for referrals and investigations, with the coordinating activities, and with the authority or responsibility for performing or providing functions, activities, and services stipulated in

the interagency agreement entered into under section 2151.428 of the Revised Code relative to that center.

(E) No township, municipal, or county peace officer shall remove a child about whom a report is made pursuant to this section from the child's parents, stepparents, or guardian or any other persons having custody of the child without consultation with the public children services agency, unless, in the judgment of the officer, and, if the report was made by physician, the physician, immediate removal is considered essential to protect the child from further abuse or neglect. The agency that must be consulted shall be the agency conducting the investigation of the report as determined pursuant to section 2151.422 of the Revised Code.

(F)(1) Except as provided in section 2151.422 of the Revised Code or in an interagency agreement entered into under section 2151.428 of the Revised Code that applies to the particular report, the public children services agency shall investigate, within twenty-four hours, each report of child abuse or child neglect that is known or reasonably suspected or believed to have occurred and of a threat of child abuse or child neglect that is known or reasonably suspected or believed to exist that is referred to it under this section to determine the circumstances surrounding the injuries, abuse, or neglect or the threat of injury, abuse, or neglect, the cause of the injuries, abuse, neglect, or threat, and the person or persons responsible. The investigation shall be made in cooperation with the law enforcement agency and in accordance with the memorandum of understanding prepared under division (J) of this section. A representative of the public children services agency shall, at the time of initial contact with the person subject to the investigation, inform the person of the specific complaints or allegations made against the person. The information shall be given in a manner that is consistent with division (H)(1) of this section and protects the rights of the person making the report under this section.

A failure to make the investigation in accordance with the memorandum is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from the report or the suppression of any evidence obtained as a result of the report and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person. The public children services agency shall report each case to the uniform statewide automated child welfare information system that the department of job and family services shall maintain in accordance with section 5101.13 of the Revised Code. The public children services agency shall submit a report of its investigation, in writing, to the law enforcement agency.

(2) The public children services agency shall make any recommendations to the county prosecuting attorney or city director of law that it considers necessary to protect any children that are brought to its attention.

(G)(1)(a) Except as provided in division (H)(3) of this section, anyone or any hospital, institution, school, health department, or agency participating in the making of reports under division (A) of this section, anyone or any hospital, institution, school, health department, or agency participating in good faith in the making of reports under division

(B) of this section, and anyone participating in good faith in a judicial proceeding resulting from the reports, shall be immune from any civil or criminal liability for injury, death, or loss to person or property that otherwise might be incurred or imposed as a result of the making of the reports or the participation in the judicial proceeding.

(b) Notwithstanding section 4731.22 of the Revised Code, the physician-patient privilege shall not be a ground for excluding evidence regarding a child's injuries, abuse, or neglect, or the cause of the injuries, abuse, or neglect in any judicial proceeding resulting from a report submitted pursuant to this section.

(2) In any civil or criminal action or proceeding in which it is alleged and proved that participation in the making of a report under this section was not in good faith or participation in a judicial proceeding resulting from a report made under this section was not in good faith, the court shall award the prevailing party reasonable attorney's fees and costs and, if a civil action or proceeding is voluntarily dismissed, may award reasonable attorney's fees and costs to the party against whom the civil action or proceeding is brought.

(H)(1) Except as provided in divisions (H)(4) and (N) of this section, a report made under this section is confidential. The information provided in a report made pursuant to this section and the name of the person who made the report shall not be released for use, and shall not be used, as evidence in any civil action or proceeding brought against the person who made the report. Nothing in this division shall preclude the use of reports of other incidents of known or suspected abuse or neglect in a civil action or proceeding brought pursuant to division (M) of this section against a person who is alleged to have violated division (A)(1) of this section, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker of the report is not the defendant or an agent or employee of the defendant, has been redacted. In a criminal proceeding, the report is admissible in evidence in accordance with the Rules of Evidence and is subject to discovery in accordance with the Rules of Criminal Procedure.

(2) No person shall permit or encourage the unauthorized dissemination of the contents of any report made under this section.

(3) A person who knowingly makes or causes another person to make a false report under division (B) of this section that alleges that any person has committed an act or omission that resulted in a child being an abused child or a neglected child is guilty of a violation of section 2921.14 of the Revised Code.

(4) If a report is made pursuant to division (A) or (B) of this section and the child who is the subject of the report dies for any reason at any time after the report is made, but before the child attains eighteen years of age, the public children services agency or municipal or county peace officer to which the report was made or referred, on the request of the child fatality review board, shall submit a summary sheet of information providing a summary of the report to the review board of the county in which the

deceased child resided at the time of death. On the request of the review board, the agency or peace officer may, at its discretion, make the report available to the review board. If the county served by the public children services agency is also served by a children's advocacy center and the report of alleged sexual abuse of a child or another type of abuse of a child is specified in the memorandum of understanding that creates the center as being within the center's jurisdiction, the agency or center shall perform the duties and functions specified in this division in accordance with the interagency agreement entered into under section 2151.428 of the Revised Code relative to that advocacy center.

(5) A public children services agency shall advise a person alleged to have inflicted abuse or neglect on a child who is the subject of a report made pursuant to this section, including a report alleging sexual abuse of a child or another type of abuse of a child referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, in writing of the disposition of the investigation. The agency shall not provide to the person any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports.

(I) Any report that is required by this section, other than a report that is made to the state highway patrol as described in section 5120.173 of the Revised Code, shall result in protective services and emergency supportive services being made available by the public children services agency on behalf of the children about whom the report is made, in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact. The agency required to provide the services shall be the agency conducting the investigation of the report pursuant to section 2151.422 of the Revised Code.

(J)(1) Each public children services agency shall prepare a memorandum of understanding that is signed by all of the following:

- (a) If there is only one juvenile judge in the county, the juvenile judge of the county or the juvenile judge's representative;
- (b) If there is more than one juvenile judge in the county, a juvenile judge or the juvenile judges' representative selected by the juvenile judges or, if they are unable to do so for any reason, the juvenile judge who is senior in point of service or the senior juvenile judge's representative;
- (c) The county peace officer;
- (d) All chief municipal peace officers within the county;
- (e) Other law enforcement officers handling child abuse and neglect cases in the county;
- (f) The prosecuting attorney of the county;

(g) If the public children services agency is not the county department of job and family services, the county department of job and family services;

(h) The county humane society;

(i) If the public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, each participating member of the children's advocacy center established by the memorandum.

(2) A memorandum of understanding shall set forth the normal operating procedure to be employed by all concerned officials in the execution of their respective responsibilities under this section and division (C) of section 2919.21, division (B)(1) of section 2919.22, division (B) of section 2919.23, and section 2919.24 of the Revised Code and shall have as two of its primary goals the elimination of all unnecessary interviews of children who are the subject of reports made pursuant to division (A) or (B) of this section and, when feasible, providing for only one interview of a child who is the subject of any report made pursuant to division (A) or (B) of this section. A failure to follow the procedure set forth in the memorandum by the concerned officials is not grounds for, and shall not result in, the dismissal of any charges or complaint arising from any reported case of abuse or neglect or the suppression of any evidence obtained as a result of any reported child abuse or child neglect and does not give, and shall not be construed as giving, any rights or any grounds for appeal or post-conviction relief to any person.

(3) A memorandum of understanding shall include all of the following:

(a) The roles and responsibilities for handling emergency and nonemergency cases of abuse and neglect;

(b) Standards and procedures to be used in handling and coordinating investigations of reported cases of child abuse and reported cases of child neglect, methods to be used in interviewing the child who is the subject of the report and who allegedly was abused or neglected, and standards and procedures addressing the categories of persons who may interview the child who is the subject of the report and who allegedly was abused or neglected.

(4) If a public children services agency participated in the execution of a memorandum of understanding under section 2151.426 of the Revised Code establishing a children's advocacy center, the agency shall incorporate the contents of that memorandum in the memorandum prepared pursuant to this section.

(5) The clerk of the court of common pleas in the county may sign the memorandum of understanding prepared under division (J)(1) of this section. If the clerk signs the memorandum of understanding, the clerk shall execute all relevant responsibilities as required of officials specified in the memorandum.

(K)(1) Except as provided in division (K)(4) of this section, a person who is required to make a report pursuant to division (A) of this section may make a reasonable number of requests of the public children services agency that receives or is referred the report, or of the children's advocacy center that is referred the report if the report is referred to a children's advocacy center pursuant to an interagency agreement entered into under section 2151.428 of the Revised Code, to be provided with the following information:

- (a) Whether the agency or center has initiated an investigation of the report;
- (b) Whether the agency or center is continuing to investigate the report;
- (c) Whether the agency or center is otherwise involved with the child who is the subject of the report;
- (d) The general status of the health and safety of the child who is the subject of the report;
- (e) Whether the report has resulted in the filing of a complaint in juvenile court or of criminal charges in another court.

(2) A person may request the information specified in division (K)(1) of this section only if, at the time the report is made, the person's name, address, and telephone number are provided to the person who receives the report.

When a municipal or county peace officer or employee of a public children services agency receives a report pursuant to division (A) or (B) of this section the recipient of the report shall inform the person of the right to request the information described in division (K)(1) of this section. The recipient of the report shall include in the initial child abuse or child neglect report that the person making the report was so informed and, if provided at the time of the making of the report, shall include the person's name, address, and telephone number in the report.

Each request is subject to verification of the identity of the person making the report. If that person's identity is verified, the agency shall provide the person with the information described in division (K)(1) of this section a reasonable number of times, except that the agency shall not disclose any confidential information regarding the child who is the subject of the report other than the information described in those divisions.

(3) A request made pursuant to division (K)(1) of this section is not a substitute for any report required to be made pursuant to division (A) of this section.

(4) If an agency other than the agency that received or was referred the report is conducting the investigation of the report pursuant to section 2151.422 of the Revised Code, the agency conducting the investigation shall comply with the requirements of division (K) of this section.

(L) The director of job and family services shall adopt rules in accordance with Chapter 119. of the Revised Code to implement this section. The department of job and family services may enter into a plan of cooperation with any other governmental entity to aid in ensuring that children are protected from abuse and neglect. The department shall make recommendations to the attorney general that the department determines are necessary to protect children from child abuse and child neglect.

(M) Whoever violates division (A) of this section is liable for compensatory and exemplary damages to the child who would have been the subject of the report that was not made. A person who brings a civil action or proceeding pursuant to this division against a person who is alleged to have violated division (A)(1) of this section may use in the action or proceeding reports of other incidents of known or suspected abuse or neglect, provided that any information in a report that would identify the child who is the subject of the report or the maker of the report, if the maker is not the defendant or an agent or employee of the defendant, has been redacted.

(N)(1) As used in this division:

(a) "Out-of-home care" includes a nonchartered nonpublic school if the alleged child abuse or child neglect, or alleged threat of child abuse or child neglect, described in a report received by a public children services agency allegedly occurred in or involved the nonchartered nonpublic school and the alleged perpetrator named in the report holds a certificate, permit, or license issued by the state board of education under section 3301.071 or Chapter 3319. of the Revised Code.

(b) "Administrator, director, or other chief administrative officer" means the superintendent of the school district if the out-of-home care entity subject to a report made pursuant to this section is a school operated by the district.

(2) No later than the end of the day following the day on which a public children services agency receives a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall provide written notice of the allegations contained in and the person named as the alleged perpetrator in the report to the administrator, director, or other chief administrative officer of the out-of-home care entity that is the subject of the report unless the administrator, director, or other chief administrative officer is named as an alleged perpetrator in the report. If the administrator, director, or other chief administrative officer of an out-of-home care entity is named as an alleged perpetrator in a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved the out-of-home care entity, the agency shall provide the written notice to the owner or governing board of the out-of-home care entity that is the subject of the report. The agency shall not provide witness statements or police or other investigative reports.

(3) No later than three days after the day on which a public children services agency that conducted the investigation as determined pursuant to section 2151.422 of the Revised

Code makes a disposition of an investigation involving a report of alleged child abuse or child neglect, or a report of an alleged threat of child abuse or child neglect, that allegedly occurred in or involved an out-of-home care entity, the agency shall send written notice of the disposition of the investigation to the administrator, director, or other chief administrative officer and the owner or governing board of the out-of-home care entity. The agency shall not provide witness statements or police or other investigative reports.

Effective Date: 01-30-2004; 09-16-2004; 04-11-2005; 05-06-2005; 08-03-2006; 09-21-2006; 2008 HB314 06-20-2008; 2008 SB163 08-14-2008; 2008 HB280 04-07-2009